UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

RAYMOND HARGROVE,	)	
	)	
Movant,	)	
	)	
v.	)	Case No. CV416-124
	)	CR414-384
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

After pleading guilty to conspiracy to commit mail fraud, wire fraud, and money laundering, (doc. 10 (plea agreement)[1], doc. 13 (judgment)), Raymond Hargrove moves under 28 U.S.C. § 2255 to vacate his sentence.[2] Doc. 16. Review of the parties' briefing shows that his motion must be denied.

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[1] All citations are to the criminal docket unless otherwise noted and all page numbers are those imprinted by the Court's docketing software.

[2] Specifically, he contends that (1) "[t]he number of victims pertaining to [his] involvement was miscalculated," and (2) [t]he Court failed to take modern dollar value into consideration when determining [his] . . . sentence regarding 3553(a) factors." Doc. 16 at 4-5. Both arguments are layered within ineffective assistance of counsel claims, which are discussed below.

After the Court sentenced him to 48 months' imprisonment (doc. 13), Hargrove never appealed. And "[a] § 2255 motion, it must be remembered, may not be used as a 'surrogate' for a missed direct appeal." *Jones v. United States*, 2015 WL 464243 at * 1 (S.D. Ga. Jan. 28, 2015) (citing *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004)); *see Stone v. Powell*, 428 U.S. 465, 478 n. 10 (1976) (28 U.S.C. § 2255 will not be allowed to do service for an appeal). "Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding."[3] *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (footnote added). A procedural default may be overcome if the movant can show "cause excusing his failure to raise the issue previously and prejudice from the alleged error." *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000). Ineffective assistance of counsel (IAC) "may satisfy the cause exception to the procedural bar," though such a claim "must have merit" to qualify. *Id.* at 1344.

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[3] All of Hargrove's Guidelines-based sentencing claims were available on direct appeal unlike, say, an ineffective assistance of counsel claim.

Hargrove nominally pleads IAC to overcome his failure to appeal by claiming that counsel never advised him that he "had a right to raise any issues on appeal, or to appeal." *See* doc. 16 at 6. Although a failure to consult with a defendant regarding an appeal can constitute IAC, *see Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000), Hargrove expressly instructed counsel *not* to file an appeal after being fully informed of his appellate rights. *See* doc. 14 ("Notice of Post-Conviction Consultation").[4] His bare claim to the contrary[5] now cannot overcome what he swore to be true shortly after sentencing. *See, e.g.*, *Eason v. United States*, 2014 WL 4384652 at * 3 (S.D. Ga. Sept. 3, 2014). And with nothing to excuse his failure to appeal, Hargrove's claims are procedurally defaulted. *See Nyhuis*, 211 F.3d at 1344.

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[4] The Notice is a document the Court developed to memorialize counsel's consultation with her client and reflect the client's decision whether to appeal. *See Guyton v. United States*, 2013 WL 1808761 at * 2 (S.D. Ga. Apr. 29, 2013) (noting that the "Notice of Counsel's Post–Conviction Obligations" requires that both counsel and client execute and file the form, thus preserving a record of defendant's instructions regarding an appeal).

[5] Hargrove offers no details beyond "[c]ounsel did [not] advise[] that [he] had a right to appeal." Doc. 16 at 4. Although that isn't a pure legal conclusion (which would itself warrant outright dismissal), it bears the hallmarks of buyer's remorse. In the face of a Notice outlining the appellate rights consultation, such a claim lacks merit and cannot constitute cause to excuse a procedural default. *Nyhuis*, 211 F.3d at 1344.

Accordingly, Raymond Hargrove's § 2255 motion should be **DENIED**. Applying the Certificate of Appealability (COA) standards set forth in *Brown v. United States*, 2009 WL 307872 at * 1-2 (S.D. Ga. Feb. 9, 2009), the Court discerns no COA-worthy issues at this stage of the litigation, so no COA should issue either. 28 U.S.C. § 2253(c)(1); Rule 11(a) of the Rules Governing Habeas Corpus Cases Under 28 U.S.C. § 2255 ("The district court *must* issue or deny a certificate of appealability when it enters a final order adverse to the applicant.") (emphasis added). Any motion for leave to appeal *in forma pauperis* therefore is moot.

SO REPORTED AND RECOMMENDED, this 10th day of August, 2016.

UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA